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Supreme Court of the United States

OCTOBER TERM, 1965

No. 699

WILLIAM EDGAR JOHN, JR.,

Appellant,

against

ELIZABETH BOWMAN JOHN,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1965

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WILLIAM EDGAR JOHN, JR.,

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against

ELIZABETH BOWMAN JOHN,

Respondent.

JURISDICTIONAL STATEMENT

1. (a) The opinions below are reported at 22 N. Y. Appellate Division 2nd 804, 254 N. Y. Supp. 2d 828; 16 N. Y. 2d 675, 261 N. Y. Supp. 2d 299. The opinions at Special Term are not reported.

(b) (i) The action was brought in the Supreme Court of the State of New York, County of Westchester, for a judgment of separation from bed and board pursuant to § 200 of the Domestic Relations Law of the State of New York.

(ii) The judgment sought to be reviewed is dated and was entered in the office of the Clerk of the Court of Appeals on June 10, 1965. The Notice of Appeal to this Court was filed on September 2, 1965 in the office of the Clerk of the Supreme Court of the State of New York, Westchester County.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. section 1257 (2).

(iv) The following cases sustain the jurisdiction of this Court:

Flournoy v. *Wiener,* 321 U. S. 253, 263;
Wilson v. *Cook,* 327 U. S. 474;
Schroeder v. *City of New York,* 371 U. S. 208, 211.

(v) The statutes of the State of Florida the validity of which is involved herein are the following Rules of Civil Procedure of the Supreme Court of the State of Florida: Rule 1.4 reading as follows (30 Florida Statues Annotated, p. 31):

"Rule 1.4. SERVICE OF PLEADINGS AND PAPERS.

(a) Service; When required. Every pleading subsequent to the initial pleadings, unless the court otherwise orders, and every order, judgment or decree not entered in open court, every written motion unless it is one as to which a hearing ex parte is authorized, and every written notice, demand and similar paper shall be served on each party affected thereby, but no service need be made on parties against whom a default or decree pro confesso has been entered except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided by law for the service of summons."

Rule 1.38 reading as follows (30 F.S.A., 1964 cumulative part, p. 96):

"Rule 1.38. RELIEF FROM JUDGMENTS, DECREES OR ORDERS.

(a) Clerical Mistakes. Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the record on appeal is docketed in the appellate court, and thereafter while the appeal is pending may be corrected with leave of the appellate court.

(b) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment or decree is void; (5) the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding, or to set aside a judgment or decree for fraud upon the court.

Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action."

Also involved in this case is Rule 3.16 reading as follows (31 F.S.A. p. 245):

"Rule 3.16. REHEARINGS.

(a) Petition. Every petition for rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record shall be verified by the oath of the party, or by some other person having knowledge of the facts. No rehearing shall be granted unless the petition is served within 10 days after the recording of the decree."

(c) (1) The questions presented by this appeal are:

(i) Whether procedural due process under the Fourteenth Amendment to the Constitution required that defendant be given notice of, and opportunity to be heard upon, plaintiff's ex parte application to vacate the final judgment of divorce procured by her by publication in Florida.

(ii) Whether the provisions of Florida Rules of Civil Procedure, 1.4 and 1.38(b), as construed by the New York Court of Appeals to dispense with the necessity for such notice and opportunity to be heard, are repugnant to the Fourteenth Amendment.

(iii) Whether said order vacating said judgment of divorce is entitled in New York to full faith and credit under Article IV of the Constitution, if it is not entitled to credit under Florida Law.

(d) The facts material to the consideration of the questions presented are:

The parties were married in the State of New York on July 30, 1957 and have one child born July 23, 1958. The

parties resided in Rye, New York. On February 12, 1963, respondent left the family home, taking the child with her, and thereafter established her residence in Pensacola in Escambia County, Florida.

On October 25, 1963 in an action instituted by respondent against the appellant in the Court of Record of Escambia County, Florida, respondent duly procured a judgment of divorce based upon service by publication against the appellant, a resident of the State of New York, who was not personally served with process in the State of Florida, and who did not appear in the action. On December 9, 1963, 45 days after the entry of such judgment, respondent, without notice to appellant, either personally or by mail, procured an ex parte order from the said Court of Record vacating the said judgment of divorce upon the stated ground that said judgment was void, but without stating the ground upon which it was claimed to be void. Copies of the petition and vacatur order are appended hereto.

On February 1, 1964 respondent instituted the present action in the Supreme Court, Westchester County, for separation on the ground of cruel and inhuman treatment, serving with the summons and complaint motion papers for an award of temporary alimony and counsel fees. To that motion, appellant made a cross-motion to dismiss the complaint, among other things, upon the ground that the said judgment of divorce of October 25, 1963 was an outstanding, valid, final judgment of divorce and that the ex parte order purporting to vacate the said judgment of divorce was invalid for lack of procedural due process under the Fourteenth Amendment to the Federal Constitution and was also void under Florida law and therefore was not entitled to full faith and credit under Article IV of the Federal Constitution.

The manner in which the Federal questions sought to be reviewed were raised was by averment thereof in appel-

lant's affidavit in support of his cross-motion to dismiss the complaint, as follows:

"3. I am advised by my attorney, Mr. Cahn, and verily believe that there is and can be no doubt of the validity of said final judgment under Section 1 of Article IV of the Constitution of the United States, even though I did not appear in said action, because at the time of the institution of the action plaintiff was, as she still is, as appears from the allegation to that effect in paragraph 3 of the complaint herein, a bona-fide resident of Pensacola, Escambia County, Florida.

4. Plaintiff will undoubtedly claim that the said final judgment, Exhibit C hereof, has been vacated, and therefore nullified, by an order entered in said Florida action at her instance, without any notice to me, by order made on December 9, 1963. For the information of the Court, certified copies of the petition and order purporting to vacate said judgment are annexed hereto as Exhibits H and I hereof, together with a photocopy of a letter, dated December 31, 1963 (Exhibit J hereof) from the Clerk of the Florida court to my attorney advising the latter that the said petition and order constitute the whole record in connection with the application to vacate the final judgment of divorce. I am advised by my said Attorney, Mr. Cahn, that the said order, Exhibit H hereof, is wholly void under the law of the State of Florida for lack of power in the Court to make it as well as noncompliance with such law and therefore subject to collateral attack herein, in consequence of which the final judgment of divorce remains wholly unaffected thereby and in full force and effect.

5. I knew nothing of said order of December 13, 1963 or of the petition upon which it was made

> until my attorney herein, Mr. Cahn, informed me that he had been advised of it by Mr. Heisler, plaintiff's attorney herein, on or about December 13, 1963 when Mr. Cahn telephoned to Mr. Heisler in response to a letter dated December 4, 1963 (Exhibit K hereof) received by me from Mr. Heisler, demanding support for plaintiff. Accordingly, because of the failure to give me any notice of, or opportunity to defend, against the application to vacate, the said order of December 13,* 1963 is also void for violation of my rights of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. It follows that plaintiff is not and was not my wife at the time of the commencement of this action by the service of the summons and complaint upon me on February 1, 1964, entitling me to dismissal of the complaint."

These questions were passed upon by the Special Term of the Supreme Court, Westchester County, by granting appellant's said cross-motion to dismiss the complaint; by the Appellate Division of the Supreme Court, Second Judicial Department, by its affirmance of the order dismissing the complaint; and by the Court of Appeals by its reversal of the order dismissing the complaint and denial of the cross-motion to dismiss the complaint. On July 9, 1965 the Court of Appeals duly amended its remittitur of the case to the Supreme Court by stating therein:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: The defendant-respondent argued that the vacatur order relied upon by plaintiff herein violated defendant's rights under

* The date, "13" is a clerical error; the correct date is "9".

and was repugnant to the Fourteenth Amendment to the Federal Constitution, and such vacatur order was not entitled to credit under and was repugnant to Article IV of that Constitution. The Court of Appeals held that there was no violation of defendant-respondent's constitutional rights."

(e) The grounds upon which the Federal questions raised herein are substantial are:

1. This Court has held many times that procedural due process requires that a party be given an opportunity to be heard, by due notice, when

> ". . . any exercise of judicial power but for the constitutional infirmity would substantially affect a defendant's rights."
>
> *Griffen* v. *Griffen,* 327 U. S. 220, 231.

In *Dohany* v. *Rogers,* 281 U. S. 362, this Court said (p. 369):

> "Its (the due process clause) requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense; due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

In *Wetmore* v. *Carrick,* 205 U. S. 141, this Court said that where (p. 158):

> ". . . such action (correction of the record) may impair the substantial right of a party to be heard against the rendition of a new judgment against him . . . he has the right to show that . . . the judgment in question ought not to be rendered against him."

This requirement was well expressed in *Rasmussen* v. *Call,* 55 Utah, 597, where an interloctory judgment of

divorce in favor of a wife was, without notice to her, vacated by the court (p. 600):

> "The effect of the interlocutory decree being to vest in plaintiff certain personal and property rights it necessarily follows that the existence of those rights denies to any court the authority or right to take the same from her, except upon legal proceedings in which plaintiff, as the interested party, has an opportunity to be heard in disproof of any attack upon such rights, and to establish the fact that she is justly entitled to the rights sought to be taken from her."

See also:

17 Amer. Juris., Divorce, § 488;
27A C.J.S. Divorce, § 172, page 702;
Williams v. *North Carolina,* 325 U. S. 226, 230;
Universal Oil Co. v. *Root Ref. Co.,* 328 U. S. 575, 580;
Hanson v. *Denckla,* 357 U. S. 235, 245;
Hannah v. *Larch,* 363 U. S. 420, 440, 442;
Grant v. *Corbitt,* Fla. Sup. 95 So. 2d, 25, 27;
Hartley v. *Hartley,* Fla. App. 134 So. 2d 281, 283;
Kitchens v. *Kitchens,* Fla. App. 162 So. 2d 539, 541 (decree pro confesso).

Clearly, the judgment of divorce, concededly valid when rendered, vested rights in appellant, for by that judgment the parties became strangers (27A C.J.S. Divorce, § 178, pages 746, 747; *Martin* v. *Martin,* Fla. Sup. 26 So. 2d 183, 184; *Carson* v. *Oldfield,* Fla. Sup., 127 So. 2d 851, 855). Among those rights were: The right to remarry; the termination of respondent's right to share in appellant's property as a distributee thereof upon the appellant's death; the right to make a will without making provision for respondent therein; and the corresponding termination of respondent's right under section 18 of Decedent Estate Law of New York to take against such will; the termination of

any obligation of appellant to support respondent except for any valid orders of the courts of Florida. These rights, privileges and immunities continued for a period of 45 days until the vacatur order was made on December 9, 1963. The practical effect of the vacatur order was to remarry appellant to respondent.

It follows that a substantial Federal question is presented whether those unquestionable rights, privileges and immunities were not of such nature and quality that appellant could not be deprived of them except upon due notice of the application to terminate them with opportunity to be heard against such action, and, conversely, whether appellant could be made subject to the obligations, duties and infirmities to which he was subject while married to respondent without similar notice and opportunity to be heard in his own behalf.

If constitutionally appellant could not again be put under marital obligations and disabilities to respondent except upon due notice to him, it follows that Florida Rules 1.4 and 1.38(b), which the New York Court of Appeals held dispensed with the need of such notice, are to that extent repugnant to the Fourteenth Amendment. None of the cases cited in the dissenting memorandum of the Appellate Division is in point because none involved a situation similar to that at bar. The summary statement in that memorandum that 1.38(b), which is almost verbatim a copy of the FRCP 60(b), required no notice is contrary to Federal practice under that Rule (cf. 7 Moore's Fed. Prac., § 60.28(3), p. 327, citing *Wetmore* v. *Carrick, supra*).

2. The further question is presented, whether the vacatur order is entitled to full faith and credit in New York in view of the fact that it is invalid under Florida law *Peo. ex rel., Halvey* v. *Halvey,* 330 U. S. 610, 614.

Prior to the promulgation of Florida Rule 1.38(b) as of July 1, 1962 (139 So. 2d 129), it is indisputable that under

strict Florida law the Florida court lost jurisdiction to vacate the judgment after the expiration of the 10-day period provided in Florida Rule 3.16 *supra*, and that except as and if authorized by Rule 1.38(b) the vacatur order was absolutely void, having been made 45 days after the entry of the judgment of divorce (*State ex rel. Huntley* v. *Gooding,* Fla. App. 155, 149 So. 2d, 55, 56, 57, pet. denied, Fla. Sup. 155 So. 2d 165).

Accordingly, except as authorized, if at all, by Rule 1.38(b), the vacatur order was plainly void. As heretofore stated, 1.38(b) is substantially a copy of FRCP 60(b), and under Florida decisions the Federal construction of similar rules are considered "pertinent" and "persuasive" (*Savage* v. *Ravell Dist. Corp.* Fla. Sup. 95 So. 2d, 415, 417; *Dobson* v. *Crews,* Fla. App. 164 So. 2d 252, 258).

That the vacatur order cannot be saved by 1.38(b) is clear.

Assuming that the order might be sustained under the Rule if the ground thereof was within the rule, even though the order is not stated to have been made thereunder, it is immediately apparent that it cannot.

The sole ground of the order was that the "entire proceedings . . . (were) void". The only provision of Rule 1.38(b) applicable to such a claim is subdivision (4) authorizing relief if "the judgment or decree is void". But "void" as there used is "void" in the classical, limited, sense of lack of jurisdiction (*Elgin W. C. Co.* v. *Barrett,* 5 Cir., 213 F. 2d 776, 778; *American Nat. Bank* v. *Taussig,* 7 Cir., 255 F. 2d 765, 768, cert. den. 358 U. S. 883; *Title* v. *U. S.,* 9 Cir., 263 F. 2d 28, 30; cf., *Ramaglia Realty Co.* v. *Graver,* Fla. App. 121 So. 2d 648, 654).

No facts establishing that the decree was void in the sense used in the Rule were set forth in the petition or order; and no claim was made below that the decree was void in that or any other sense. It is undisputed that

when made the decree was fully authorized and properly made.

Since then the decree was not void in the sense of Rule 1.38(b), and that was the only ground upon which the vacatur order was purportedly made, it follows that respondent may not now resort to the Rule to rescue the order from the absolute condemnation of the strict Florida rule, heretofore cited, under which the order was undeniably and undeniedly void for lack of jurisdiction.

Schildhaus v. *Moe*, 2 Cir., 335 F. 2d, 529, 531;
Barnes v. *American Broad. Co.*, 7 Cir., 259 F. 2d, 858;
Tobriner v. *Chefe*, D. C. Cir., 335 F. 2d 281, 282-283.

(h) Copies of the opinions below are appended hereto.

(i) Copy of the order appealed from is appended hereto.

(j) Copies of the vacatur petition and order are appended hereto.

Dated, October 26, 1965.

Respectfully submitted,

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MONROE J. CAHN,
Of Counsel.

APPENDIX

Unreported Opinion of Special Term.

SUPREME COURT

WESTCHESTER COUNTY

ELIZABETH BOWMAN JOHN,

Plaintiff,

against

WILLIAM EDGAR JOHN, JR.,

Defendant.

DONOHOE, J.

The plaintiff's motion for an order directing the defendant to pay support and maintenance and counsel fees is denied. Defendant's cross-motion for an order dismissing the complaint is granted under CPLR, Rule 3211, (a) (1), (5) and (7).

This is an action for separation. According to the affidavits furnished on behalf of the plaintiff wife, the parties were married on July 30, 1957 and lived together until February 13, 1963, when the wife went to stay with some old friends at Pensacola, Florida. There is one child of the marriage, a daughter, who was born on July 23, 1958. The plaintiff took this child with her when she left.

The complaint alleges a course of cruel and inhuman treatment. Defendant's cross-motion attacks the sufficiency of this complaint on the ground that it does not adequately particularize the events complained of. This segment of the cross-motion, however, need not be considered, because the complaint fails on other grounds.

It appears from the defendant's papers that the plaintiff, upon establishing residence in the State of Florida,

commenced an action against the defendant for divorce and obtained a decree of divorce on October 25, 1963, prior to the commencement of this action. No question is raised with regard to the jurisdiction of the Florida Court to grant the divorce, and it does appear that notice was given the defendant in order to bestow jurisdiction on that Court.

Subsequently, for reasons best known to the plaintiff she petitioned the Escambia Court of Record of Escambia County, on December 6, 1963, for an order vacating the decree of divorce. The uninformative ground set forth in her petition was, "Because of certain matters, it is imperative that this Court nullify the aforesaid final decree of divorce, and to declare the same void". It further alleged that the defendant had failed to support plaintiff and her minor child and that as a result the plaintiff's rights had been greatly jeopardized. That Court granted the petition, without notice to the defendant, and entered an order vacating the divorce decree on December 9, 1963.

It is upon the validity of this latter decree that decision of this motion rests. The defendant argues, quite properly in the opinion of this Court, that the Court of Record of Escambia County was without jurisdiction to set aside its previously granted decree of divorce.

Certain statutes of the State of Florida, claimed to be pertinent to the issue, have been brought to the attention of the Court. Since their effect is contradictory and the opposing parties claim under different ones, both will be quoted at the outset so that the basis of determination may be clear.

The foundation of defendant's contention is Florida Rules of Civil Procedure Rule 3, 16 (a) which states:

> "Petition. Every petition for rehearing shall contain the special matter or cause on which rehearing is applied for, shall be signed by counsel, and the facts

> therein stated, if not apparent on the record shall be verified by the oath of the party, or by some other person having knowledge of the facts. No rehearing shall be granted unless the petition is served within ten days after the recording of the decree."

Plaintiff on the other hand, argues that Rule 1.38 of that statute, which says:

> "Corrections of Judgments, decrees and proceedings. Clerical mistakes in judgments, decrees, orders or other parts of the record and errors therein arising from oversight or omissions may be corrected by the Court at any time on its own initiative or on motion of any party after such notice, if any, as the Court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is entered in the Appellate Court, and thereafter while the appeal is pending may be so corrected with leave of the Appellate Court . . ."

Clearly, the Courts of this state will not interfere with the judicial acts of sister states when they are founded upon jurisdiction. Milliken v. Meyer, 311 U.S. 457. This Court does not concern itself with the merits of the Florida decree, however, but solely with question of jurisdiction to vacate its own decree, ex parte.

Comparison of the quoted statutes does not leave any serious doubt about their respective functions. Rule 3.16 relates to the corrections of matters of substantial right, requiring a petition which sets forth, under oath, the material facts relied upon and a rehearing, unless such facts appear on the record. It is obviously designed for the correction of mistakes involving substantial right. Rule 1.38, on the other hand, plainly provides for the correction of matters of form, by its clear term, it allows

correction of clerical mistakes . . . and errors (in the record) arising from oversight or omission."

In this case, the petition to vacate the decree is a guide to determining which of the Rules applies. It said that "the plaintiff is within Escambia County, Florida, with a young child, and the defendant has failed and refused to properly support either the plaintiff or the minor child, and as a result of the aforesaid decree, the plaintiff's rights have been greatly jeopardized." Such a sworn statement leaves no doubt that the plaintiff found it to her distinct disadvantage to have obtained a decree of divorce. Having, by her own prosecution of the action to judgment, terminated all of he rights included in the matrimonial relationship, she discovered that she was materially prejudiced thereby. She then sought to return to her married state and to reinvest herself with all of these rights without notice to the defendant.

It may well be, that for a period of ten days following the entry of the decree of divorce the Court of Record of Escambia County would have retained jurisdiction of the action to correct such injustices as its own substantive law protects against. This seems to be the meaning of the last sentence of Rule 3.16 (a). But that ten day period set a plain limitation on the retention of jurisdiction, and when the period expired, jurisdiction was lost. State ex rel. Lorenz v. Lorenz, 149 Fla. 625, 6 So. 2d 620; Battieger v. Battieger, 109 So. 2d 602. See also, 1 University of Florida Law Review page 377.

This Court cannot agree that the correction of a mistake in form only was involved, so as to permit correction under Rule 1.38, for the reasons stated above. Nor will the Court subscribe to the argument that the under vacating the decree was correctible only on appeal under the holding of Hendry v. Lewis, 59 So. 2d 854, since that case dependent upon the retention of jurisdiction.

In accordance with the decision in Halvey v. Halvey, 330 U. S. 610 (614) this Court will exercise the same powers

that the Florida Court would have in circumstances, and does determine that the vacating order of the Court of Record of Escambia County made December 9, 1963 is null and void.

Submit order on notice.

JOHN P. DONOHOE,
J.S.C.

Dated: March 21, 1964
Cold Spring, New York

Unreported Opinion of Special Term on Reargument.

DONOHOE, J.

Motion for an order granting leave to reargue is granted and, upon reargument, the motion for alimony and counsel fees is denied.

This Court, in adhering to its original decision, dated March 21, 1964, is not unmindful of Section 1.38 (b) of the Florida Rules of Civil Procedure, and the case of Odum v. Morningstar, 158 So. 2d 776, whch appear to authorize a retention of jurisdiction for a year after the entry of judgment.

However, it is to be noted that the jurisdiction so retained by the Florida Court is to be exercised on motion. Rule 1.4, Rules of Civil Procedure and, as stated in the case cited, the purpose of the rule was to allow motion procedure in lieu of a bill of review.

This case involves the vacation of a decree of divorce ex parte, an act beyond the jurisdiction of the Florida Court.

Submit order.

Dated: April 15, 1964, Cold Spring, New York.

JOHN P. DONOHOE, J.S.C.

Appendix

Decision of Appellate Division, Second Department 22 App. Div. 2d 804.

In an action for a judicial separation, the plaintiff wife, a resident of the State of Florida, appeals from an order of the Supreme Court, Westchester County, made April 28, 1964 upon reargument, which: (1) denied her motion for temporary alimony and counsel fee; and (2) granted the defendant husband's cross motion to dismiss the complaint on the grounds: (a) that the parties are no longer husband and wife by reason of a Florida decree of divorce which the wife had obtained against the husband on his default after constructive service of process upon him, and (b) that said decree is unaffected by a subsequent Florida decree, made on the wife's application to the Florida court without notice to the husband, vacating the divorce decree and declaring it to be null and void.

Order affirmed, without costs. No opinion.

BELDOCK, P.J., UGHETTA and KLEINFELD, JJ., concur.

CHRIST and BRENNAN, JJ., dissent and vote to reverse the order, to deny the cross motion and to remit the matter to the Special Term for determination on the merits of plaintiff's motion for alimony and counsel fee *pendente lite*, with the following memorandum by BRENNAN, J., in which CHRIST, J., concurs:

I cannot agree that the courts of this State must give full faith and credit to a divorce decree which has been "set aside, declared void and held for naught" in the State of its rendition.

In my opinion it is not a denial of due process not to give further notice of proceedings to a defaulting party. The notice essential to due process is the original notice giving jurisdiction, and not notice of the time for the exercise of jurisdiction already vested; and, after jurisdiction has duly attached, it has been said that a party has no constitutional right to demand notice of further proceedings (16A C.J.S., Constitutional Law, p. 803).

Indeed, under the New York practice, no service of papers need be made upon a party who is in default for failure to appear (CPLR 2103, subd. [e]). In Florida, a similar procedural rule obtains:

> "Rule 1.4. Service of Pleadings and Papers
>
> (a) Service; When Required. Every pleading subsequent to the initial pleadings, unless the court otherwise orders, and every order, judgment or decree not entered in open court, every written motion unless it is one as to which a hearing ex parte is authorized, and every written notice, demand and similar paper shall be served on each party affected thereby, *but no service need be made on parties against whom a default or decree pro confesso has been entered* except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided by law for service of summons" (Florida Rules of Civil Procedure).

It is my view that the emphasized portion of the foregoing rule is applicable to the case at bar. The exception which follows the emphasized words pertains to "*pleadings* asserting new or additional claims." Plaintiff's application to vacate the Florida divorce decree was not a "pleading".

Rule 1.38 of the Florida Rules of Civil Procedure which gives the court the power to relieve a party from a final decree where the same "is void", as was done here, does not require notice.

It has been stated that, in the absence of statute, notice of a motion to set aside a default judgment is unnecessary (49 C.J.S., Judgments, p. 663; cf. Crook v. Heizer, 129 Okla. 36; Metz v. Melton Coal Co., 185 Ark. 486; Planters' Lumber Co. v. Sibley, 130 Misc. 26). Moreover, where, by statute, notice to an adverse party was required, it

has been held that notice to a defendant was not required where the plaintiff sought merely to vacate a judgment in favor of himself (Franklin v. Hunt Dry Goods Co., 190 Okla. 296). And in New York it has been held that the fact that an order vacating a judgment was made without notice to some of the parties to an action constitutes an irregularity only and does not affect the jurisdiction of the court to vacate the judgment (Weston v. Citizens' National Bank, 88 App. Div. 330).

In my opinion, the order of the Florida court vacating the prior divorce decree is presumptively valid and is a final order which should be given full force and effect in this State (Williams v. Williams, 17 A D 2d 958). So considered, the record shows that the Florida divorce has been vacated by the Florida court; that the parties are still husband and wife; and that the present separation action is maintainable.

Decision of Court of Appeals, 16 N. Y. 2d 675.

Order reversed, with costs in all courts, upon the dissenting opinion at the Appellate Division and the matter remitted to Special Term for determination on the merits of plaintiff's motion for temporary alimony and counsel fees.

Appendix

Judgment and Order Appealed From.

COURT OF APPEALS

STATE OF NEW YORK, ss

PLEAS in the Court of Appeals, held at Court of Appeals Hall in the City of Albany on the 10th day of June in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR June 10, 1965

2 No. 45

ELIZABETH BOWMAN JOHN,
Appellant,
vs
WILLIAM EDGAR JOHN, JR.,
Respondent.

Be it Remembered, That on the 30th day of January, in the year of our Lord one thousand nine hundred and sixty-five, Elizabeth Bowman John, the appellant in this cause, came here unto the Court of Appeals, by Irving Heisler, her attorney—, and filed in the said Court a Notice of Appeal and return thereto from the Appellate Division of the Supreme Court in and for the Second Judicial Department And William Edgar John, Jr., the respondent—in said cause, afterwards appeared in said Court of Appeals by Monroe J. Cahn, his attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Irving Heisler, of counsel for

the appellant, and by Mr. Monroe J. Cahn, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs in all courts, upon the dissenting memorandum at the Appellate Division, and the matter remitted to Special Term for determination on the merits of plaintiff's motion for temporary alimony and counsel fees.

And it was also further ordered that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed, with costs &c, as aforesaid.

And hereupon, as will the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York

Court of Appeals, Clerk's Office

Albany, June 10, 1965

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

Appendix

Petition to Vacate Judgment of Divorce.

IN THE COURT OF RECORD IN AND FOR ESCAMBIA COUNTY, FLORIDA, IN CHANCERY

ELIZABETH BOWMAN JOHN,

Plaintiff,

vs.

WILLIAM E. JOHN, JR.,

Defendant.

The plaintiff, Elizabeth Bowman John, respectfully shows unto the court as follows:

1. That heretofore on October 25, 1963, this court entered a final decree of divorce in the above styled cause.

2. Because of certain matters it is imperative that this court nullify the aforesaid final decree of divorce, and to declare the same void.

3. That in addition to the foregoing, the plaintiff is within Escambia County, Florida, with a young child, and the defendant has failed and refused to properly support either the plaintiff or the minor child, and as a result of the aforesaid decree, the plaintiff's rights have been greatly jeopardized.

WHEREFORE, promises considered, plaintiff prays this court will annul and declare void the entire divorce proceeding instituted before this court by the plaintiff, and in which a purported final decree was entered therein by this court on October 25, 1963, and will grant unto her such

other and further relief as the court may deem equitable and just.

LEVIN AND ASKEW

by DAVID H. LEVIN
David H. Levin
Attorneys for Plaintiff
Suite 250 Professional Building
Pensacola, Florida

STATE OF FLORIDA }
COUNTY OF ESCAMBIA } ss.:

Before me this day personally appeared David H. Levin, who, being first duly sworn on oath, deposes and says that he is the attorney for the plaintiff in the foregoing cause, and that the matters and allegations contained in the foregoing petition are true and correct.

DAVID H. LEVIN
David H. Levin

SWORN TO AND SUBSCRIBED before me this sixth day of December, A. D. 1963.

DOROTHEA P. STEINSIEK
NOTARY PUBLIC
My commission expires 12-10-66

Appendix

Order Vacating Judgment of Divorce.

IN THE COURT OF RECORD IN AND FOR ESCAMBIA COUNTY, FLORIDA, IN CHANCERY

ELIZABETH BOWMAN JOHN,

Plaintiff,

vs.

WILLIAM E. JOHN, JR.,

Defendant.

This cause coming on to be heard upon petition of the plaintiff for an order to nullify and declare void, and set aside the final decree of divorce entered herein on October 25, 1963, between the plaintiff and the defendant, which was called on upon petition of the plaintiff, and upon which the defendant did not appear; said decree being granted upon constructive service of process; and certain matters having been brought to the attention of the court which the court was not aware of at the time of the entry of the aforesaid final decree, and which matters render the entire proceeding void; now therefore, it is

ORDERED, ADJUDGED AND DECREED:

1. That the final decree of divorce entered by this court on October 25, 1963, between the plaintiff and defendant, be and the same is hereby set aside, declared void and held for nought, and the entire proceeding be and the same is hereby dismissed, and the bonds of matrimony attempted to be dissolved by the decree of this court referred to, be and the same are hereby declared to be in full force and effect the same as if this proceeding for divorce had not intervened.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida, this 9th day of December, A. D. 1963.

M. C. BLANCHARD,
Judge.

Office-Supreme Court, U.S.
FILED
NOV 1 8 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 699

WILLIAM EDGAR JOHN, JR.,

Appellant,

against

ELIZABETH BOWMAN JOHN,

Appellee.

APPELLANT'S REPLY BRIEF

WARNER PYNE,
Counsel for Appellant.

MONROE J. CAHN,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

Supreme Court of the United States

OCTOBER TERM, 1965

No. 699

WILLIAM EDGAR JOHN, JR.,

Appellant,

against

ELIZABETH BOWMAN JOHN,

Appellee.

APPELLANT'S REPLY BRIEF

The grounds of appellee's motion to dismiss or affirm are two (p. 1):

1. That the appeal is not authorized because the validity of a state statute was not drawn in question on the ground of repugnancy to the Constitution, with the decision in favor of validity; and

2. That the appeal does not present a substantial federal question.

I

Appellee's argument that the appeal is not authorized ignores the facts and misconceives the law.

Neither the vacatur order nor the petition upon which it was based (Jur. St. pp. 23-25), set forth the statutory ground, if any, whether Court Rule or otherwise, upon

which they were made, as appellee admits (p. 4); accordingly, in his assertion of federal invalidity appellant could not attack any specific statute or rule, and grounded his application in all-inclusive terms, which encompassed every possible ground, statute or rule upon which the appellee might seek to sustain the vacatur (Jur. St. pp. 6-7). The Special Term sustained appellant's attack upon the ground that the Florida Court did not have "jurisdiction to vacate its own decree *ex parte*" (Jur. St. pp. 15, 17). The Appellate Division affirmed without opinion. The first Court to hold that the vacatur order was authorized by the Florida Rules was the Court of Appeals. Then for the first time Florida Rules 1.4 and 1.38 were interpreted as dispensing with the necessity for notice to appellant, and were resorted to and applied as an answer to the claim of lack of constitutional procedural due process (Jur. St. pp. 18-20, 22). The Court of Appeals has certified that the federal constitutional question was duly raised and considered (Jur. St. pp. 7-8).

This Court's jurisdiction of the appeal is sustained by the authorities heretofore cited by us (Jur. St. p. 1) and further by *Charleston Ass'n* v. *Alderson,* 324 U. S. 182, 185:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction of the appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. Manhatan Life Ins. Co. v. Cohen, 234 U. S. 123, 134; Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 551; Saltonsall v. Saltonsall, 276 U. S. 260, 267; Home Ins. Co. v. Dick, 281 U. S. 397, 407; Nickey v. Mississippi, 292 U. S. 393, 394; Whitfield v. Ohio, 297 U. S. 431, 435-6."

Appellee asserts (p. 4) that appellant has made his own selection of the Florida statutes claimed to be repugnant to the Fourteenth Amendment. This is incorrect. At appellee's instance the Court of Appeals selected Florida Rules 1.4 and 1.38 as sufficient to avoid the constitutional requirement of due process (Jur. St. pp. 18-19, 22). We added Florida Rule 3.16 as also being "involved in this case" (Jur. St. p. 4) in obedience to Rule 15 (1) (c) (1) of the Rules of this Court that "(o)nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court" (cf., *Flournoy* v. *Wiener*, 321 U. S. 253, 263) and also, if needed, for its bearing on consideration of certiorari under U.S.C. § 1257(c).

II

Appellee's contention (p. 5) that a substantial federal question is not presented is supported by the citation of no authority. It requires no argument that the absence of procedural due process presents a fundamental federal question under the Fourteenth Amendment; and that such question, if present, is substantial unless it has been authoritatively ruled upon. Since appellant is unable to cite any case where such ruling has been made the substantiality of the question is self-evident.

Appellee claims (p. 6) that *Griffin* v. *Griffin*, 327 U. S. 220 and *Wetmore* v. *Carrick*, 205 U. S. 141, are not applicable because in both of those cases the aggrieved party had at one time appeared in the action, appellee's implication being that such prior appearance was the basis of this Court's ruling. The implication is disproved by those decisions. In neither case was the right to notice of the *ex parte* action under review grounded upon such prior appearance; the ground of decision in both was that the rights affected were of such substantial character that they could not be adjudicated without notice to the party acted against, with opportunity to be heard in opposition. So at

bar appellant's right to notice is based upon the *ex parte* deprivation and destruction of the substantial rights of status and property which for 45 days had vested in him by virtue of and under the vacated judgment of divorce.

Appellee's contention (p. 7) that the vacatur order rests upon non-federal grounds requires little notice. Whether the New York Court of Appeals correctly interpreted the Florida Rules is not in issue, though it is of passing interest that neither the New York Court nor appellee has cited a single Florida case to support the interpretation and application of such Rules claimed by them, and there are Florida cases to the contrary (Jur. St. p. 11).

The question in issue on this appeal is: assuming that the New York Court correctly interpreted the Florida Rules, is the application of such Rules so interpreted to validate the vacatur order repugnant to the Fourteenth Amendment? That this question is incontestably for this Court is not doubtful (e.g., *Ballard* v. *Hunter*, 204 U. S. 241; *Young* v. *Ragen*, 337 U. S. 235, 238).

III

Appellee frankly admits (p. 5):

> "both the appellant and the appellee would be merely guessing as to what statute was involved in the Florida Court's action."

This is a confession that appellee is unable to point to any Florida authority that justified the vacatur under Florida law, warranting the conclusion that since the vacatur cannot be sustained under Florida law it is not entitled to credit in New York (Jur. St. p. 10, ¶2). Moreover, appellee makes no attempt to support the holding of the New York Court of Appeals by the citation of any federal or other authority. Nor does appellee attempt to dispute that rights of status and property vested in ap-

pellant by virtue of the decree of divorce (Jur. St. p. 9). Under these circumstances, we believe that the error in the ruling of the Court of Appeals is so clear that argument of the appeal is unnecessary and that the judgment of the Court of Appeals may properly be reversed on the papers submitted; and the order of the Appellate Division affirmed, with costs.

If such summary disposition is not made, it is respectfully asked that jurisdiction of the appeal be noted, that the case be added to the summary calendar and that the argument be set for an early date. The reason for early consideration is that under the remand of the Court of Appeals the Special Term has made an award against appellant of temporary alimony amounting to over $14,000 to be paid immediately, with additional future payments of $175 weekly, and, in addition, of counsel fees of $5,000, of which $2,500 is directed to be paid at once, which allowances will fall if this Court reverses the judgment of the Court of Appeals.

Respectfully submitted,

WARNER PYNE,
Counsel for Appellant.

MONROE J. CAHN,
of Counsel.

END